



Federal Communications Commission
Washington, D.C. 20554
October 31, 2007

In Reply Refer to:
1800B3-LAS/JP

Bott Communications, Inc.
10550 Barkely – Suite 108
Overland Park, KS 66212

Jet Fuel Broadcasting
c/o Dave Garey
20 Samlaw Drive
Monsey, NY 10952

Re: **AM Broadcast Auction 84
MX Group 84-91**

Black Hawk, South Dakota
Facility ID No. 160981
File No. BNP-20040130ARV

Orchard Homes, Montana
Facility ID No. 161341
File No. BNP-20040130AQP

**Applications for New AM Station
Construction Permits**

Dear Applicants:

We have before us two mutually exclusive AM applications. Bott Communications, Inc. (“Bott”) proposes a new AM station at Black Hawk, South Dakota, and Jet Fuel Broadcasting (“Jet”) proposes a new AM station at Orchard Homes, Montana. As discussed below, we find a dispositive preference for Bott under Section 307(b) of the Communications Act of 1934, as amended¹ (the “Act”), and therefore direct Bott to file its long-form application within 60 days of the date of this letter for a construction permit in that community.

Background. In situations such as the one before us, the grant of an application would normally be resolved by a competitive bidding process.² However, in the *Broadcast First Report and Order*, the Commission determined that the competitive bidding procedure should be consistent with its statutory mandate under Section 307(b) of the Act to provide a “fair, efficient, and equitable” distribution of radio services across the nation. To this end, the Commission directed the staff to undertake a traditional

¹ 47 U.S.C. § 307(b).

² See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses* (“*Broadcast First Report and Order*”), First Report and Order, 13 FCC Rcd 15920 (1998), *recon denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724 (1999), *modified*, Memorandum Opinion and Order, 14 FCC Rcd 12541 (1999).

Section 307(b) analysis prior to conducting an auction for mutually exclusive AM applications.³ The Commission also noted that the FM allotment priorities fulfill its obligation under Section 307(b), and would apply in making a Section 307(b) determination regarding mutually exclusive AM applications before auction.⁴

Discussion. Both applications propose a first local transmission service and claim Priority (3) under the applicable allotment priorities. Where, as in this instance, the proposed new AM station's 5 mV/m contour will cover a significant portion of an Urbanized Area, we do not automatically award a first local service preference. Rather, we have used the criteria set forth in *Faye and Richard Tuck* ("Tuck")⁵ as a guideline in determining whether the proposed community has an identity distinct from the Urbanized Area, and is therefore entitled to consideration for a first local service. These criteria are: (1) the degree to which the proposed station will provide coverage to the Urbanized Area; (2) the size and proximity of the proposed community of license relative to the central city of the Urbanized Area; and (3) the interdependence of the proposed community of license to the Urbanized Area, utilizing the eight *Tuck* factors.⁶ By letter dated July 10, 2006, the staff requested that each applicant supplement its Section 307(b) showing with information addressing the *Tuck* criteria in order to determine whether its proposal warrants a first local service preference.

Black Hawk proposal: On July 31, 2006, Bott provided the requested information, acknowledging that its proposed station at Black Hawk will place a daytime 5 mV/m contour over a significant portion of the Rapid City, South Dakota, Urbanized Area. The record reflects that the population of Black Hawk (2,432 persons) is 4.0 percent of the population of Rapid City (59,607 persons), and Black Hawk is approximately 9.3 miles away from the center of Rapid City. However, these facts do not necessarily preclude a finding that Black Hawk warrants a first local service preference.⁷ While these two factors are pertinent, they are less significant than evidence substantiating the independence of Black Hawk from Rapid City.

³ *Broadcast First Report and Order* at 15964-65.

⁴ See *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982). The FM allotment priorities are as follows: (1) First fulltime aural service, (2) Second fulltime aural service, (3) First local transmission service, and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3). The FM allotment priorities were first applied to Section 307(b) determinations in mutually exclusive AM proceedings in *Alessandro Broadcasting Co.*, Decision, 56 RR 2d 1568 (Rev. Bd. 1984).

⁵ *Faye and Richard Tuck*, Memorandum Opinion and Order, 3 FCC Rcd 5374 (1988).

⁶ The eight factors set forth in *Tuck* are: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services.

⁷ See *Bay St. Louis and Poplarville, Mississippi*, Report and Order, 10 FCC Rcd 13144 (MMB 1995) (first local service preference awarded when population difference was only 4.48 percent); *Ada, Newcastle and Watonga, Oklahoma*, Report and Order, 11 FCC Rcd 16896 (MMB 1996) (first local service preference awarded when contour coverage of 85-95 percent of Urbanized Area and population difference of less than 1 percent); *Oraibi, Arizona*, Report and Order, 14 FCC Rcd 13547 (MMB 1999) (first local service preference awarded when contour coverage of 90 percent of Urbanized Area).

Bott contends that, based on the *Tuck* factors, Black Hawk is independent from Rapid City. In support, Bott submits that a large portion of residents work in Black Hawk (factor 1). Black Hawk does not have its own newspaper or other media outlets (factor 2). Bott also states that Black Hawk's community leaders and residents perceive their community as being separate from the larger area of Rapid City, because several commercial entities identify themselves with Black Hawk, rather than Rapid City, by use of Black Hawk in their commercial names (factor 3). Black Hawk is unincorporated and thus, does not have its own local government. It does, however, have its own fire department, water department, and sanitation department (factor 4). Black Hawk has a distinct zip code assigned to it, and its own post office (factor 5). Numerous commercial establishments exist within Black Hawk, including construction companies, car dealerships, day cares, hotels, and many retail establishments. In addition, Black Hawk is home to a number of medical facilities serving the residents (factor 6). Bott admits that Black Hawk businesses must rely on sources outside the community for their advertising needs, indicating that it is likely Black Hawk and Rapid City are in the same advertising market (factor 7). Black Hawk has its own fire, water, and sanitation departments. Bott states that Meade County provides the remainder of municipal services to Black Hawk residents, not Rapid City or Pennington County, the county in which Rapid City is located. However, Black Hawk residents are served by the Rapid City School District. To the extent that Black Hawk residents rely on a government unit for services, it is Meade County, and not Rapid City, that provides a majority of these services (factor 8). We find that the preponderance of the evidence submitted supports the conclusion that Black Hawk is independent of Rapid City.⁸

Orchard Homes proposal: On July 31, 2006, Jet provided the requested information, acknowledging that the proposed station at Orchard Homes will place a daytime 5 mV/m contour over a significant portion of the Missoula, Montana, Urbanized Area. The record reflects that the population of Orchard Homes (5,199 persons) is 9.1 percent of the population of Missoula (57,053 persons), and Orchard Homes is approximately 2.5 miles away from the center of Missoula.

On the key third *Tuck* criterion, Jet has not shown that a majority of the eight factors regarding independence have been met. The information provided by Jet is not sufficient to outweigh the evidence of Orchard Homes' dependence on Missoula. Jet states that the number of Orchard Homes' residents that work within their community cannot be determined. Additionally, Orchard Homes is an unincorporated community, thus it has no local government. Furthermore, Orchard Homes does not provide its citizens with any municipal services.⁹ Jet states that all municipal services are received from Missoula County. Orchard Homes does not have an independent newspaper or other local media outlets. Jet claims that Orchard Homes has its own zip code. However, an independent search of the United States Postal Service database reveals that Orchard Homes does not have a distinct zip code. The several commercial and medical establishments within Orchard Homes use a Missoula mailing address. Jet admits that Orchard Homes and Missoula are part of the same advertising market. We find that the preponderance of the evidence submitted strongly suggests a dependence of Orchard Homes on the Missoula Urbanized

⁸ While factors 2, 4, and 7 indicate some interdependence between Black Hawk and the Rapid City Urbanized Area, we have considered a community independent when evidence supporting a majority of these factors demonstrates that the proposed community of license is distinct from the Urbanized Area. Thus, not every factor must weigh in favor of a finding of independence. See, e.g., *Parker and St. Joe, South Dakota*, Report and Order, 11 FCC Rcd 1095 (MMB 1996); *Jupiter and Hobe Sound, South Dakota*, Report and Order, 12 FCC Rcd 3570 (MMB 1997)

⁹ See, e.g., *Wallace, Idaho and Lolo, Montana*, Report and Order, 14 FCC Rcd 21110, 21113 (1999) (community found to be dependent on larger Urbanized Area when it lacked a local government, independent municipal services, and local media outlets).

Area. Under these circumstances, we cannot credit Orchard Homes with a first local service preference under priority (3).

After careful consideration of both applications, we have determined that the Bott proposal is entitled to a dispositive Section 307(b) preference. Bott's application meets the criteria for a preference under priority (3) of the applicable allotment priorities as a first local transmission service to Black Hawk, South Dakota.¹⁰ Accordingly, Bott will be directed to continue the application process by filing a complete FCC Form 301 application.¹¹

Conclusion / Action. Accordingly, IT IS ORDERED that Bott, within 60 days of the date of this letter, is to file a complete FCC Form 301 in connection with its application for a construction permit for a new AM broadcast station at Black Hawk, South Dakota (File No. BNP-20040130ARV), pursuant to the procedures set forth in the Commission's Rules.¹² With its application, Bott must simultaneously submit the required filing fee for a new commercial AM station and an FCC Form 159, Remittance Advice.

The facilities proposed in the FCC Form 301 must comply with all applicable AM rules. Bott must demonstrate that the proposed facility protects existing stations and earlier filed applications, and that the daytime and nighttime facilities comply with principal city coverage requirements.¹³ Any differences between the tech box proposal filed during the AM Auction No. 84 filing window and the complete FCC Form 301 must be minor changes, as defined by the applicable AM service rules,¹⁴ and must not create new application conflicts.

The complete FCC Form 301 application must be filed electronically through the Media Bureau's Consolidated Database System (CDBS) online electronic forms system. For information regarding electronic application filing, refer to the April 28, 2000, Public Notice, *Mass Media Bureau Implements Consolidated Database System (CDBS) Electronic Filing of FCC Forms 301, 302, 314, 315, 316, and 347*. When filing the complete FCC Form 301, an applicant must select "Long Form Application for AM Auction No. 84" on the Pre-form for Form 301 (Question 2 – Application Purpose). In addition, the CDBS file number previously issued to the tech box submission filed in the AM Auction No. 84 filing window must be entered on the Pre-form in the field "Eng. Proposal File Number." Instructions for use of the electronic filing system are available in the CDBS User's Guide, which can be accessed from the electronic filing website at <http://www.fcc.gov/mb/elecfile.html>. For assistance with electronic filing, call the Audio Division Help Desk at (202) 418-2662.

¹⁰ Furthermore, we find that Black Hawk, South Dakota constitutes a community suitable for licensing purposes. See *Arnold and Columbia, California*, Memorandum Opinion and Order, 7 FCC Rcd 6302, 6303 (MMB 1992).

¹¹ After the FCC Form 301 is filed, the staff will conduct a complete legal and technical analysis. We will issue Public Notices entitled "Broadcast Applications," announcing AM auction applications determined to be acceptable for filing. These notices will be generated by the Consolidated Database System ("CDBS"). Petitions to deny an FCC Form 301 application, must be filed within 10 days following release of the Broadcast Applications Public Notice announcing acceptance of the application at issue. *Broadcast First Report and Order*, 13 FCC Rcd at 15985. The staff will dismiss the application filed by Jet (File No. BNP-20040130AQP) upon action taken on the application filed by Bott.

¹² See 47 C.F.R. §§ 0.401(b), 1.1104, 1.1109, 73.5005(d), and 73.3512.


¹³ See *id.* §§ 73.24, 73.37, and 73.182.

¹⁴ *Id.* § 73.3571.

The staff will return applications not submitted in accordance with the procedures described above. Failure to timely file the complete FCC Form 301 application will result in dismissal of the tech box proposal filed during the AM Auction No. 84 filing window for failure to prosecute, pursuant to Section 73.3568 of the Commission's Rules.¹⁵

Sincerely,



Peter H. Doyle 
Chief, Audio Division
Media Bureau

cc: Harry C. Martin, Esq.

¹⁵ *Id.* § 73.3568.